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Nos. 366 and 387

In the Supreme Court
of the United States

OCTOBER TERM, 1962

EARL C. COREY,

Petitioner,

v.

UNITED STATES OF AMERICA.

LAURENCE M. SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY BRIEF OF PETITIONERS

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The Government having filed only one consolidated brief in opposition to the separate petitions herein, petitioners assume it is appropriate to file a consolidated reply thereto.

I

Question as to Trial Court's Participation in the Trial

Petitioner Smith's position in this regard is set out as fully as we are able to do in his petition. We submit

that a fair review of the record will reveal that the Government's attempt to rephrase the questions involved is, to say the least, misleading.

For instance, on page 2 of the Government's brief, they state the question to be as follows:

> "Whether the trial court's participation in questioning petitioner Smith, and his comments, denied Smith a fair trial."

The question goes much further and deeper than that, as pointed out on pages 8 to 14 inclusive of Smith's petition. We submit that the things there pointed out which did occur during the trial resulted in actually depriving Smith of his right of trial by jury. The Government in its brief has wholly failed to meet the issue thus raised.

The Government argues, on page 15, as follows:

> "Petitioner Smith complains (S. Pet. 9) that the judge on his own motion restricted cross-examination of Richards and advised the jury that Richards was friendly to Smith. The transcript shows merely an inquiry by the judge as to whether Richards was still an *employee* of petitioner Smith and, upon Richards' affirmative reply, an instruction to petitioner's counsel to refrain from further leading questions of a witness who was *obviously friendly* (3 R. 131; S. Pet. A 42)." (Emphasis supplied)

This statement that the inquiry of the judge was as to whether Richards was still an "employee" of Smith is erroneous. Richards was not and never had been an employee of smith and record so indicates. It shows that what the court asked was whether Richards

was still *connected* with Mr. Smith (S. Pet. A 42). We do not know what the court meant by "connected". The government also states that Richards was "obviously friendly" with Smith. That assertion is not supported by the record either. Admittedly, the court stated that Richards was a friendly witness but that was only an assumption of the judge. Nothing in the record supports the conclusion.

According to the theory of the Government's case there was as much reason for an indictment of Richards as Smith, and it is obvious that his interest and reasons for testifying as he did might well be subject to searching inquiry. Even if the record did show that the witness was "obviously friendly", which it did not, we think no authority can be found to suggest that this is any ground or reason for summarily limiting cross-examination of the Government's most important witness.

The reasoning of the Government (Br. 16) where it mentions the trial court's castigation of the witness Phelps and its subsequent comment to the jury about him and his credibility (S. Pet. A 52) is obscure. The Government says:

> "As the court of appeals noted (1 R. 44 (10), S. Pet. A 13), the colloquy was perhaps unfortunate. But it cannot have prejudiced Smith, since he himself testified that Three State was a partnership (4 R. 377, 379)."

The answer does not meet the contention. Why the fact that Smith testified that Three State was a partnership would eliminate the prejudice of these remarks

of the court is not explained. Mr. Smith contended there was no element of illegal purpose or intent to defraud in his agreement with Mr. Richards and Mr. Corey. He was charged with conspiracy: with having a specific intent to violate the law. As a witness he had testified to his good faith efforts to determine the legality of associating with Mr. Corey (Tr. 313, 325). His own testimony in that respect was seriously impaired when the court dramatically told the jury Smith was greatly interested in the outcome of the litigation and that his testimony should be evaluated by the jury with that in mind (Tr. 693). Mr. Phelps, with his testimony about the same fact, constituted vital corroboration of Smith's own evidence. The comment swept aside everything the witness Phelps said, including his statements of fact that Smith had consulted him and received certain advice. Furthermore, it suggested that Smith was a dishonest person for claiming he had received advice from such a man as Phelps. The issue was the good faith of Smith in entering into the partnership and not the fact of whether or not such a partnership was entered into.

The Court of Appeals and the Government have completely ignored some of the important matters concerning the proposition now under discussion. For instance, the court called upon counsel for Smith to stipulate in the presence of the jury that Smith had made the very representations which he was charged with having falsely made. By this act, Smith was called upon in the presence of the jury to give evidence against himself. (S. Pet. A 45, 46).

Perhaps this is its contention:

> "In the attempt to clarify and expedite a lengthy trial, the trial judge did occasionally interrupt the questioning by the defense and by government" (Br. 14).

Even if the court was attempting to "clarify and expedite a lengthy trial", that is entirely beside the point. This request for a stipulation called upon counsel in a serious criminal case to admit the assumed guilt of his client and carried with it an obvious implication that the court believed that there were documents in the file under discussion being offered by the Government "which show that he represented he was the sole owner."

It was wholly unnecessary for the court to call for any kind of a stipulation and it was improper. The price of an "attempt to clarify and expedite a lengthy trial" should not be a compromise of the rights of a defendant.

The Government says:

> "On the face of it, it is evident that petitioner is, for the most part, unduly attempting to magnify a minor incident, or to read prejudice into a correct ruling. For example, the initial claim of prejudice (S. Pet. 8) is based on the fact that when petitioner's counsel in his opening statement was broadly discussing the merits of the government commodity program, the court pointed out that this would be irrelevant, since the issue was whether Smith had made false statements in the documents presented to the government, and not whether the storage contract obtained under these documents was, or was not, beneficial to the government (3 R. 12-14; S. Pet. A 40-41)." (Br. 14-15)

We disagree that the court made a correct ruling, or that Smith's counsel was in any way attempting to discuss the merits of the Government's commodity program. It was the Government's theory that it did not have to prove it had actually lost anything, or that the contract was a bad one for the Government. Nevertheless the Government would have been entitled to prove them if it could, and the prosecutor had stated to the jury in his opening statement as follows:

> "We have other proof, of course, that would suggest that the warehouse might be unfavorable (sic) considered from the standpoint of the government." (Tr. 10)

It must be remembered practically any jury selected in the Northwest could well include persons familiar with the wheat business whose experience in prior years would make it seem inconceivable to have stored wheat in anything excepting a conventional grain elevator. To such people a contract to store grain in any other kind of facility, would suggest impropriety. Because of that and other related statements by the prosecutor, counsel needed to make a brief explanation to the jury about the condition of the wheat storage business during the few years immediately prior to the trial when the surplus of stored wheat in the Northwest increased enormously in the period from 1952 to 1956. The knowledge about this terrific surplus would explain why the Government might legitimately contract to store wheat in a warehouse which, if there was plenty of choice of space, might be considered unfavorable. The matter was material and should have been permitted. Noth-

ing was remotely intended or suggested about the merits of the Government program. The court's castigation of Smith's counsel for attempting such explanation (S. Pet. A 41) established an atmosphere and inferred to the jury that counsel was attempting to avoid the issue and mislead them into irrelevant considerations. The statements being made were perfectly proper and referred to a material matter. In fact, the Government had announced an intention to raise the issue and present evidence upon it.

Numerous other misconceptions of the record are contained in the Government's brief, some of which are rather minor, but the total of which might bring about a misunderstanding of the whole situation. For example they say (Br. 8):

> "After discussions with Richards and Smith, the three (Corey, Richards and Smith) agreed *to operate* the warehouse." (Emphasis supplied)

There is no record of any such agreement "to operate". In fact, they agreed that Smith would operate the warehouse and that Richards and Corey would not. Their participation was as investors (Tr. 113, 114).

The Government mentions at page 10 of its brief that Corey declined to follow a recommendation to him that, for economy reasons, unloading of ships should be discontinued. This is wholly immaterial to this case. There is no evidence that the wheat stored in the ships was of the same grade or type as the wheat stored in Three State Warehouse. The wheat stored in Three State Warehouse was a variety which was used for pur-

poses entirely different from the wheat stored in the ships, and was a different commodity (Tr. 48, 59, 175, 346). The Government fails to mention that it was the declared policy of the United States Government to give preference to privately operated warehouses for storage of government-owned grain (Tr. 61), this policy being expressed by Congress, Title 15 USCA Sec. 714 c(9).

The Government argues at page 13 of its brief:

> "Finally, as the court below notes, since directors of the commodity offices of CSS assisted in the negotiation of the uniform storage rates to be paid warehousemen, 'the profits earned by each warehouse were in part determined by the director [Corey]" (1 R. 44(21); C. Pet. A 27)."

If this was important, and supported the inference claimed for it by the Government, Smith should have had a right to testify with reference to his knowledge as to how the storage rates were fixed. Smith was charged with a specific intent to defraud and violate the law, but when he attempted to do so, the court stated:

> "We are getting far afield. I have let you go, Mr. Spaulding, on a lot of immaterial things. There is no contention here that any special rates were given him. That is one of the items that the government does not claim." (S. Pet. App. C, p. 46).

The Government has missed or ignored the basic point which petitioner Smith seeks to present and has attempted to remove from context the incidents of which we complain. So extracted, an answer is attempted for a few of them individually.

We seek to present the whole picture of this trial. Some of the things which the trial court did were gross denials of petitioners' rights. Others were less serious by themselves but made their individual contribution to the unfairness of the whole proceeding. We seek here to call attention to them briefly to indicate that this court should hear the matter. We think a full and detailed discussion of each and its respective contribution to the whole fabric more properly belongs in the brief on the merits.

II

The Conflict of Interest Statute

The brief of the United States is premised on the assumption that there is sufficient evidence in the record to support a judgment of conviction as to the petitioner Corey. If we were disposed to admit this—which we do not—it would not be relevant to the first question presented in the petition for certiorari. The evidence to which the Government refers has largely to do with general decisions on policy matters which confronted Corey and which might affect the company in which he had an interest as well as other concerns engaged in storing grain for the Government. If the trial court misconstrued 18 U.S.C. 434 and gave to the jury erroneous instructions on which a verdict of guilty could be based, no court can say that the jury did not follow these erroneous instructions and base its verdict upon them. The instructions to which we refer are thus summarized by the Court of Appeals:

"The trial court instructed the jury, in effect,

that Corey could be convicted under the conflict of interest statute if he was a partner in Three State Warehouse Company, was employed as an officer or agent of the United States as head of an office which did business with that company, and if he knew that the company was doing business with the office over which he had charge. The trial court also advised the jury that, under the circumstances, it was not necessary for the Government to show that Corey physically executed one or more of the contracts between Commodity and the warehouse company, or that he engaged in negotiations looking towards the execution of those contracts." See A27, Petition of Corey for Writ of Certiorari.

These instructions were tantamount to an instructed verdict of guilty and the Court of Appeals stated the question posed by these instructions as follows:

> "The question presented is whether an officer or agent of the United States who is the administrative head of an office which to his knowledge negotiates and enters into contracts with a particular business entity, but who does not personally participate in such negotiations or the execution of such contracts, and who does not give any particular instructions with regard to those dealings to his subordinates who carry on such dealings under blanket authority, may be found to have engaged in 'the transaction of business' with such entity, within the meaning of the conflict of interest statute, 18 U.S.C., Sec. 434." See A28, Petition of Corey for Writ of Certiorari.

The Government, in support of its arguments as to why this Court should not grant Corey's petition, says in a footnote on page 11 of its brief:

> "* * * Corey raises as a question but does not argue the sufficiency of the evidence to support his conviction for conspiring to make false statements.

> However, his sentence on that count runs concurrently with the sentence on the substantive count."

In his brief in the appellate court Corey argued the insufficiency of the evidence to support his conviction on Count Nine. The Court of Appeals reached no decision as to the sufficiency of the evidence to support a conviction on that count. See A46, Petition for Corey for Writ of Certiorari. It would appear, therefore, that regardless of what is now said as to the insufficiency of the evidence, the first question submitted in Corey's petition for a writ of certiorari is presented in this case and that a decision on that question adverse to the Government must lead to a reversal of the judgment below.

The opinion of the Circuit Court of Appeals says that under the facts of a particular case, the connection which the head of an agency has with the dealings the agency carries on with a company may be so remote and tenuous that ultimate responsibility plus knowledge are not alone sufficient to warrant a finding that the official engaged in "the transaction of business." See A30, Petition of Corey for Writ of Certiorari. In the Government's brief (page 12) it is said of Corey that—

> "He was no far-distant government official with his duties unrelated to grain and its storage * * *"

We have heretofore urged and do now that if such is to be the construction of Section 434, no man of common understanding could know at what point the line is drawn between that which is lawful and that which is a violation of the statute. The statute would be ren-

dered uncertain and void. We do not agree with the Court of Appeals that it was the defendant's duty to suggest to the trial court some modification of its instructions. If the issue of the defendant's proximity to the operations conducted in the office was to be a deciding factor in the case, then the trial court should have submitted the issue under proper instructions. The fact that it would be difficult to frame instructions on which to submit such an issue makes it plain that the statute so construed would be void for uncertainty.

III

Question as to Inspection of Income Tax Returns

The Government's presentation on this question consists simply of a summary of its argument on the merits, in which it urges:

1. The inspection of such tax returns was in no respect illegal; and

2. In any event, petitioners should have discovered earlier that the government's investigation and prosecution stemmed from such inspection.

A. To the argument that the inspection of tax returns in this instance was in full compliance with the law, petitioners emphasize that the classification of tax returns into two categories, for purposes of determining the procedures to be followed in publicizing such returns, was that of Congress (Section 6103(a) of the Internal Revenue Code of 1954). Under this congressional scheme of classification, *any* tax return could be opened to public inspection under "rules and regu-

lations promulgated by the President." ((Section 6103 (a)(2)). Certain returns upon which the tax had been determined by the Secretary could also be inspected "upon order of the President and under rules and regulations *prescribed by the Secretary or his delegate* and approved by the President" (Section 6103(a)(1)). (Emphasis supplied)

The latter procedure was followed in 1939 when President Roosevelt issued Executive Order No. 8230 (4FR 3777) stating "it is hereby ordered that the following designated returns * * * shall be open to inspection in accordance and upon compliance with the rules and regulations prescribed by the Secretary of the Treasury in the Treasury decision * * * approved by me this date * * *." As Mr. Corey's tax return was not one upon which the tax had been determined by the Secretary, the regulations prescribed by the Secretary of the Treasury in 1939 do not make the inspection of his tax return less criminal.

In Section 6103 (a)(2) Congress placed the primary responsibility for the regulations relating to the publicity of tax returns, such as Mr. Corey's, in the President. Petitioner does not contend, as the government seems to suggest (Brief in Opposition, p. 21), that the President is required to draft the regulations under IRC Section 6103(a)(2). However, Congress has clearly determined that the President is required to assume direct responsibility for such regulations as opposed to merely approving regulations prescribed by the Secretary of the Treasury under Section 6103(a)(1). Until

the President assumes the responsibility Congress requires, the publicity of tax returns such as Mr. Corey's, remains a criminal offense. To hold in accordance with the Government's argument is to conclude that when it enacted Sections 6103(a)(1) and 6103(a)(2), Congress intended that these two adjacent provisions, although the one is couched in language clearly and explicitly different from the other, should be construed as prescribing the identical requirement, with the result that one of the sections becomes wholly inoperative. The distinction was made by Congress, and the burden should not be upon petitioners, as intimated by the court below, to demonstrate that Congress really intended what it said.

The Government suggests that no question exists as to the compliance by the Government with the regulations which it says authorized the inspection of the tax returns in this instance. On the contrary, petitioners certainly do not concede the fact of compliance. In fact, the record indicates that the government did *not* comply with the regulations. In the filed stipulation of the parties (R.M. 3) appears the following statement of the Government concerning the disclosure of the tax returns in this case:

> "The income tax returns of Earl C. Corey for the years 1951 through 1958 were *forwarded to* the Department of Agriculture by *Acting Commissioner, Internal Revenue Service,* in response to a request from the Acting Secretary of Agriculture." (Emphasis supplied)

The regulations in question authorize the disclosure

of returns on the written request of the head of an executive department other than the Treasury Department *only* in the discretion of the *Secretary of the Treasury*, not the Acting Commissioner of the Internal Revenue Service (Sec. 463 C. 33 of Treasury Decision 4929 (4FR 3778)). Additionally, Section 463 C. 36 provides that where inspection of tax returns is authorized,

> "* * * returns may be inspected only in the Bureau of Internal Revenue, Washington, D. C., unless such returns are in the custody of a collector of internal revenue or internal revenue agent in charge or the head of a field division of the Technical Staff, in which event the returns may be inspected in the office of such collector or agent in charge or head of division, but only in the presence of an internal revenue officer, designated by the collector or agent or head of division for that purpose."

It is obvious that the disclosure of returns by decision of an official other than the Secretary of the Treasury, and the forwarding thereof to the Department of Agriculture constitute clear violations of the very regulations upon which the Government relies.

B. With respect to the Government's suggestion that petitioners somehow should have discovered earlier the Government's use of income tax returns as the launching point of its investigation and prosecution, petitioners submit that the conduct of the Government, consisting of:

> (a) The negative and misleading answer given petitioner Corey by the Government agent when Corey asked the direct question of whether his tax returns had been examined (Tr. 249); and

(b) The persistent refusal thereafter of the Government to divulge the fact that Corey's income tax returns had been so used, accompanied by the Government's misleading and untruthful characterizations of the source of its initial knowledge as "a confidential source" and an "informer" (R.M. 2).

was such as to negate any duty on petitioners' part to conclude, contrary to the presumption of official regularity, that Government agents had acted illegally.

We have, in accordance with our understanding of proper procedure, attempted to refrain from arguing the ultimate merits of these propositions. However, we believe that the Government has, with regard to the matters above stated, attempted to argue the merits and in doing so has in some instances failed to state the situation fairly. Therefore this reply, of necessity, has gone somewhat into the merits.

Respectfully submitted,

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